

1 UNITED STATES DISTRICT COURT  
 2 FOR THE WESTERN DISTRICT OF NORTH CAROLINA  
 3 (Asheville Division)

4 -----x  
 5 UNITED STATES OF AMERICA, :  
 6 Plaintiff, :  
 7 :  
 8 vs :Criminal Action:1:16-CR-6  
 9 :  
 10 BENJAMIN ERNEST JOHNSON, :  
 11 Defendant. :  
 12 -----x

11 May 11, 2016  
 12 Asheville, North Carolina

13 The above-entitled action came on for a Plea/Rule  
 14 11 Hearing Proceeding before the HONORABLE DENNIS LEE  
 15 HOWELL, United States Magistrate Judge, commencing at  
 16 9:40 a.m.

17 **APPEARANCES:**

18 On behalf of the Plaintiff:

19 **DAVID A. THORNELOE, Esquire**

20 U. S. Attorney's Office

21 100 Otis Street Suite 233

22 Asheville, North Carolina 28801

23 On behalf of the Defendant:

24 **R. COREY B. ATKINS, Esquire**

25 Brazil & Burke, P.A.

77 Central Avenue, Suite E

Asheville, North Carolina 28801

Tracy Rae Dunlap, RMR, CRR  
 Official Court Reporter

828.771.7217

I N D E X

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Reporter's Certificate .....21

**P R O C E E D I N G S**

THE COURT: I'm now going to call our next case on the calendar which is the case of United States of America versus Benjamin Ernest Johnson, which is file 1:16-CR-6, and which is on the calendar for a Rule 11 or plea hearing. Mr. Johnson, I am advised that you have filed a written plea agreement in regard to the charges that are pending against you in this matter. As a result, I'm required to inquire and advise you concerning that agreement. I'm going to have to ask you some questions, and you're going to be required to personally respond to those questions under oath. So I need for you to stand up, please. Sir, put your left hand on the Bible, raise your right hand and take the oath to tell the truth from the clerk.

(Witness duly sworn at 9:41 a.m.)

**EXAMINATION**

BY THE COURT:

Q. I'm going to let you set down, sir. I've got several questions to go over with you, and I want you to be comfortable. Mr. Johnson, do you understand that you're under oath and that you are required to give truthful answers to the questions that I am about to ask you?

A. Yes, Your Honor.

1 Q. Do you understand that if you give false  
2 information under oath you may be prosecuted for perjury  
3 or false statement?

4 A. Yes, Your Honor.

5 Q. After consulting with your attorney do you want  
6 this court to accept your plea of guilty to Count Two as  
7 contained in the Bill of Indictment?

8 A. Yes, Your Honor.

9 Q. Do you understand that you have the right to have  
10 a United States district judge conduct this proceeding?

11 A. Yes, Your Honor.

12 Q. Recognizing your right to proceed before a  
13 district judge do you expressly consent to proceed in  
14 this court? That is before a United States magistrate  
15 judge?

16 A. Yes, Your Honor.

17 Q. Are you now under the influence of alcohol,  
18 medicines or drugs of any sort?

19 A. No, Your Honor.

20 Q. There has been presented to me a document entitled  
21 "Sealed Addendum to Entry and Acceptance of Guilty Plea"  
22 which provides information to me concerning your name,  
23 age, education and use of alcohol or drugs. Did you  
24 review that document with your attorney, and is all the  
25 information that you provided in that document true and

1 accurate?

2 A. Yes, Your Honor.

3 Q. Is your mind clear and do you understand that  
4 you're here to enter a plea of guilty to Count Two as  
5 contained in the Bill of Indictment?

6 A. Yes, Your Honor.

7 Q. In the Bill of Indictment -- let me ask you this.  
8 Have you received a copy of the indictment and have you  
9 discussed its contents with your attorney Mr. Atkins?

10 A. Yes, Your Honor.

11 Q. In Count Two of the Bill of Indictment it is  
12 alleged as follows: From on or about February 26th 2014  
13 through on or about February 28th 2014, in Buncombe  
14 County, within the Western District of North Carolina and  
15 elsewhere, Benjamin Ernest Johnson did knowingly  
16 persuade, induce, entice and coerce, and did knowingly  
17 attempt to persuade, induce, entice and coerce an  
18 individual whom he believed to not yet have attained the  
19 age of 18 years to engage in any sexual activities for  
20 which any person could be charged with criminal offenses.  
21 Those crimes, including employing and using a minor to  
22 engage in sexually explicit conduct for the purpose of  
23 producing a visual depiction of such conduct, in  
24 violation of Title 18, United States Code, Section  
25 2221(a), and in so doing using a facility and means of

1 interstate and foreign commerce, all in violation of  
2 Title 18, United States Code, Section 2422(b).

3 Are you pleading guilty to that offense?

4 A. Yes, Your Honor.

5 Q. The law requires that I advise you of the  
6 essential elements of such an offense. Before I advise  
7 you of those elements I am going to review with you the  
8 statute and then go over the elements with you. 18,  
9 United States Code, Section 2242(b) --

10 MR. THORNELOE: Your Honor, excuse me, it's 2422.

11 THE COURT: Yeah, 18 -- 18, United States Code,  
12 2242(b).

13 MR. THORNELOE: I'm sorry. I heard Your Honor  
14 say 2242.

15 THE COURT: If I did, I was mistaken.

16 MR. THORNELOE: Thank you, Your Honor.

17 **FURTHER EXAMINATION**

18 BY THE COURT:

19 Q. Let me go over it again. United States Code,  
20 Section 22 -- 18 -- let me go over it again. 18 United,  
21 States Code, 2422(b) reads as follows: Whoever using the  
22 mail or any facility or means of interstate or foreign  
23 commerce, or within the special maritime and territorial  
24 jurisdiction of the United States, knowingly persuades,  
25 induces, entices, or coerces any individual who has not

1 attained the age of 18 years to engage in prostitution or  
2 any sexual activity for which any person can be charged  
3 with a criminal offense, or attempts to do so, shall be  
4 fined under this title and imprisoned not less than ten  
5 years or for Life.

6 The elements of the offense described in that  
7 statute and as is described in Count Two of the Bill of  
8 Indictment are as follows:

9 1. That you knowingly used a facility of  
10 interstate commerce transmission of communications by  
11 means of the interstate through use of a computer  
12 constitutes the use of interstate commerce;

13 2. To knowingly persuade, induce, entice or  
14 coerce;

15 3. A person who is younger than 18 years of age  
16 at the time;

17 4. To engage in illegal sexual activity; and

18 5. That you did such acts knowingly,  
19 intentionally, willfully, and unlawfully.

20 Do you understand each element of the offense  
21 charged in Count Two of the Bill of Indictment as I have  
22 explained them to you?

23 A. Yes, Your Honor.

24 Q. Do you understand that if this matter went to  
25 trial the government would be required to prove each

1 element of the offense charged beyond a reasonable doubt?

2 A. Yes, Your Honor.

3 Q. Do you understand that the government would be  
4 required to prove that the -- that you committed such an  
5 offense knowingly, intentionally, willfully, and  
6 unlawfully?

7 A. Yes, Your Honor.

8 Q. I'm also required by law to advise you concerning  
9 the maximum and any minimum penalties prescribed by law  
10 for such an offense. The maximum possible penalty for  
11 this offense is a term of imprisonment of not less than  
12 ten years nor more than Life imprisonment, a fine not to  
13 exceed the sum of \$250,000, or both, a term of supervised  
14 release of not less than five years nor more than Life,  
15 and a \$100 special assessment. Do you understand the  
16 charges against you, including those maximum penalties  
17 that you face if convicted?

18 A. Yes, Your Honor.

19 Q. Have you been advised by your attorney,  
20 Mr. Atkins, that if you're not a citizen of the United  
21 States your guilty plea may have adverse immigration  
22 consequences?

23 A. Yes, Your Honor.

24 Q. Have you been advised by your attorney that if  
25 you're not a citizen of the United States your guilty



1 plea may result in your deportation or removal from the  
2 United States?

3 A. Yes, Your Honor.

4 Q. Do you understand that entering a plea of guilty  
5 to a felony charge may deprive you, at least for a time,  
6 of certain civil rights such as the right to vote, hold a  
7 public office, serve on a jury, and possess a firearm?

8 A. Yes, Your Honor.

9 Q. Have you spoken with Mr. Atkins about how the  
10 United States sentencing guidelines may apply in your  
11 case?

12 A. Yes, Your Honor.

13 Q. Do you understand that the district judge will not  
14 be able to determine the applicable sentencing guideline  
15 range until after your presentence report has been  
16 prepared and you have had an opportunity to comment upon  
17 it?

18 A. Yes, Your Honor.

19 Q. Do you understand that in some circumstances you  
20 may receive a sentence that is different, that is either  
21 higher or lower than that called for by the guidelines?

22 A. Yes, Your Honor.

23 Q. Do you understand that the Court may order  
24 restitution where applicable?

25 A. Yes, Your Honor.

1 Q. Do you understand that if the sentence is more  
2 severe than you expect or the Court does not accept the  
3 government's sentencing recommendation you will still be  
4 bound by your plea and have no right to withdraw the plea  
5 of guilty?

6 A. Yes, Your Honor.

7 Q. Do you understand that parole has been abolished  
8 in the federal system and that if you're sentenced to a  
9 term of imprisonment you will not be released on parole?

10 A. Yes, Your Honor.

11 Q. If your sentence includes imprisonment, do you  
12 understand that the district judge may also order a term  
13 of what is called "supervised release?"

14 A. Yes, Your Honor.

15 Q. Do you understand that if you violate the terms  
16 and conditions of supervised release, which typically  
17 last from one to five years, you could be returned to  
18 prison for an additional period of time?

19 A. Yes, Your Honor.

20 Q. Do you understand that you have a right to plead  
21 "not guilty," to have a speedy trial before a judge and  
22 jury, to summons witnesses to testify in your behalf, and  
23 to confront witnesses against you?

24 A. Yes, Your Honor.

25 Q. If you exercised your right to trial you would be

1 entitled to the assistance of an attorney, you would not  
2 be required to testify, you would be presumed innocent,  
3 and the burden would be on the government to prove your  
4 guilt beyond a reasonable doubt. Do you understand all  
5 of these rights?

6 A. Yes, Your Honor.

7 Q. By entering this plea of "guilty" you're waiving  
8 or giving up all of these rights. There will be no  
9 trial. If your plea of guilty is accepted there will be  
10 one more hearing where the district judge will determine  
11 what sentence to impose. Do you understand all of these  
12 rights?

13 A. Yes, Your Honor.

14 Q. Are you in fact guilty of the count in the Bill of  
15 Indictment to which you have come to court today to plead  
16 guilty? That is, did you commit the acts described in  
17 Count Two of the Bill of Indictment?

18 A. Yes, Your Honor.

19 THE COURT: Have the United States and the  
20 defendant entered into a plea agreement in regard to this  
21 case, Mr. Atkins?

22 MR. ATKINS: Yes, Your Honor, we have.

23 THE COURT: If you would please, Mr. Thorneloe,  
24 would you present the terms of the agreement?

25 MR. THORNELOE: Thank you, Your Honor. The plea

1 agreement is in writing. It's document number 15. It  
2 was filed on May 3rd 2016. In paragraph 1, the defendant  
3 a agrees to enter a voluntary plea of guilty to Count Two  
4 as set forth in the Bill of Indictment. He admits to  
5 being in fact guilty as charged in Count Two.

6 In paragraph 2, if the Court finds the defendant's  
7 plea to be voluntarily and knowingly made and accepts the  
8 plea then the United States will move at the appropriate  
9 time to dismiss counts one, three and four.

10 In paragraph 4, the defendant understands that the  
11 maximum penalties for Count Two are \$250,000 fine, no  
12 fewer than ten years' imprisonment, a maximum of Life,  
13 and a maximum supervised release term of Life.

14 In paragraph 7, pursuant to Rule 11(C)(1)(b), the  
15 parties recommend -- they will jointly recommend that the  
16 Court make the following findings and conclusions as to  
17 the sentencing guidelines: That the government agrees  
18 that defendant's entry of plea is timely for purposes of  
19 the guidelines, that notwithstanding the foregoing  
20 stipulations the United States and the defendant reserve  
21 the right to argue in favor of any other enhancements or  
22 reductions that may apply, that either party may seek a  
23 departure or variance from the applicable guideline  
24 range, that the United States will inform the Court and  
25 the probation office of all facts pertinent to the

1 sentencing process and will present any evidence  
2 requested by the Court.

3 Paragraph 7(e). The defendant agrees to register  
4 as a sex offender and agrees to the terms of sex offender  
5 registration as laid out in that paragraph.

6 In paragraph 8 the defendant agrees to the  
7 following with respect to financial disclosures, monetary  
8 penalties, forfeiture, and restitution.

9 In paragraph 8(a) the defendant agrees to pay full  
10 restitution in regards to the resulting loss amount to  
11 all victims directly or indirectly harmed by the  
12 defendant's relevant conduct, including conduct  
13 pertaining to any dismissed counts or uncharged conduct  
14 as defined by sentencing guideline 1B1.3 regardless of  
15 whether such conduct constitutes an offense under 18,  
16 United States Code, Sections 2259, 3663, or 3663(a).

17 In paragraph 19, the defendant -- concessions made  
18 by the United States in the plea agreement, waives all  
19 rights to contest the conviction and/or the sentence as  
20 to except for, one, claims of ineffective assistance of  
21 counsel or, two, prosecutorial misconduct.

22 In paragraph number 27 and 26, Your Honor, the  
23 defendant agrees that the agreement is effective and  
24 binding as signed by the defendant, and the defendant  
25 agrees to the entry of this plea agreement at this court

1 hearing.

2 In paragraph 27 the defendant agrees there are no  
3 agreements, representations or understandings between the  
4 parties in this case other than those set forth in this  
5 plea agreement or as noticed to the court during the plea  
6 colloquy and contained in writing in a separate document  
7 signed by all parties.

8 Other than the factual basis, Your Honor, there  
9 are no other separate documents. This agreement has been  
10 signed by myself for the United States, by Mr. Atkins,  
11 the attorney for the defendant, and by Mr. Johnson, the  
12 defendant, on May 22nd 2016.

13 THE COURT: Thank you, sir.

14 **FURTHER EXAMINATION**

15 BY THE COURT:

16 Q. Mr. Johnson, do you understand those to be the  
17 terms of the plea agreement and do you agree with those  
18 terms?

19 A. Yes, Your Honor.

20 Q. Has the right to appeal your conviction and/or  
21 sentence been expressly waived in the plea agreement?

22 A. Yes, Your Honor.

23 Q. Has the right to challenge your conviction and/or  
24 sentence in a post-conviction proceeding also been  
25 expressly waived in the plea agreement?

1 A. Yes, Your Honor.

2 Q. I believe your signature is on the plea agreement;  
3 is that correct?

4 A. Yes, Your Honor.

5 Q. Are you aware that a document entitled "Factual  
6 Basis" has been filed as an attachment to your plea  
7 agreement, and that is document number 16 in the file?

8 A. Yes, Your Honor.

9 Q. Have you read this factual basis document and do  
10 you understand it and agree with it?

11 A. Yes, Your Honor.

12 Q. Has anyone threatened, intimidated, or forced you  
13 to enter your guilty plea today?

14 A. No, Your Honor.

15 Q. Other than the terms of your plea agreement has  
16 anyone made you promises of leniency or a light sentence  
17 to induce you to plead guilty?

18 A. No, Your Honor.

19 Q. Have you had enough time to discuss with  
20 Mr. Atkins, your attorney, any possible defenses that  
21 you have to these charges?

22 A. Yes, Your Honor.

23 Q. Are you satisfied with the services of Mr. Atkins  
24 in this case?

25 A. Yes, Your Honor.

1 Q. Is there anything you'd like to say at this time  
2 about the services of your attorney?

3 A. No, Your Honor.

4 Q. Have you heard and understood all parts of this  
5 proceeding and do you still wish to plead guilty?

6 A. Yes, Your Honor.

7 Q. Would you like or do you have any questions or  
8 statements that you'd like to make at this time?

9 A. No, Your Honor.

10 THE COURT: Mr. Atkins, have you reviewed each of  
11 the terms of the plea agreement with Mr. Johnson and are  
12 you satisfied that he understands those terms?

13 MR. ATKINS: I am, Judge.

14 THE COURT: Mr. Johnson, the majority of the  
15 questions that I have asked you are contained in a  
16 document entitled "Entry and Acceptance of Guilty Plea/  
17 Rule 11 Proceeding." As I was asking you the questions  
18 that are contained within that document I was attempting  
19 to accurately record your answers, but I will need for  
20 you and Mr. Atkins to review this document and make sure  
21 that I have indeed accurately recorded your answers.  
22 More importantly, I need for you and Mr. Atkins to make  
23 sure that the answers that you gave me to those questions  
24 were truthful. If, after review, you and he find that  
25 the answers to the questions are both accurate and



1 truthful then I will need for you and he to sign this  
2 document and to then return it back to me.

3         Based upon the representations and answers given  
4 by the defendant and his attorney in this proceeding I  
5 find that the defendant's plea is knowingly and  
6 voluntarily made and that the defendant understands the  
7 charges, the potential penalties, and the consequences of  
8 his plea. I further find that the defendant's plea is  
9 supported by an independent basis in fact containing each  
10 of the elements of the offense to which the defendant is  
11 pleading guilty. Based thereon, the defendant's plea is  
12 hereby accepted.

13         In addition, I recommend that the district court  
14 accept the defendant's plea and enter judgment thereon.  
15 If you have any objection to my recommendation you have  
16 14 days to file such objections in writing with this  
17 court. If you fail to object within that 14-day period  
18 it shall be deemed a waiver of any such objection. Let  
19 me now provide that document to Ms. Wurst for filing.

20         It appears now that I must address 18, United  
21 States Code, Section 3143 which is entitled "Release or  
22 Detention of a Defendant Pending Sentence or Appeal."  
23 Subsection (b) of that statute -- or, actually, (a)(2) of  
24 that statute reads: The judicial officer shall order  
25 that a person who has been found guilty of an offense in

1 the case described in subparagraph (a), (b), or (c) of  
2 subsection (F)(1) of Section 3142 and is awaiting  
3 imposition or execution of sentence be detained, unless"  
4 (a)(1) the judicial officer finds there's a substantial  
5 likelihood that a motion for acquittal or new trial be  
6 granted or, (2), attorney for the government has  
7 recommended that no sentence of imprisonment be imposed  
8 on the person, and the judicial officer by -- and (b) the  
9 judicial officer finds by clear and convincing evidence  
10 that the person is not likely to flee or pose a danger to  
11 the safety of any other person or the community.

12           It appears that Mr. Johnson now has entered a  
13 plea of guilty to an offense which is described in  
14 3142(F)(1)(a), that being a crime of violence as provided  
15 by 18, United States Code, Section 3156(c) and, thus, he  
16 has entered a plea of guilty to one of those offenses.  
17 Due to the plea of guilty I do not believe I can find  
18 there's a substantial likelihood that a motion for  
19 acquittal or new trial be granted. Mr. Thorneloe, will  
20 an attorney for the government recommend that no sentence  
21 of imprisonment be imposed on Mr. Johnson?

22           MR. THORNELOE: No, Your Honor.

23           THE COURT: As a result, I don't believe I have --  
24 the statute's mandatory. I don't believe I have any  
25 choice other than to order that Mr. Johnson be detained,

1 but I'll certainly hear from you about it Mr. Atkins.

2 MR. ATKINS: No, Your Honor. We just wish it to  
3 continue for cause were something to arise we could rebut  
4 that, but at this time we don't have anything.

5 THE COURT: All right. I'm going to have to then  
6 enter an order revoking the terms and conditions of  
7 Mr. Johnson and placing him in the custody of the  
8 marshals. I'll place that order in writing. The  
9 defendant would have 14 days in which he could give  
10 notice of appeal. Notice of appeal would have to be in  
11 writing and filed with the clerk's office.

12 Is there anything further from the government's  
13 standpoint that we need to take up in regard to  
14 Mr. Johnson's case?

15 MR. THORNELOE: Yes, Your Honor. I have a  
16 consent order and judgment of forfeiture pertaining to  
17 one piece of property, and it's been signed by myself, by  
18 Mr. Atkins, and by the defendant.

19 THE COURT: All right. I have received a consent  
20 order and judgment of forfeiture and it provides that  
21 Mr. Johnson would be forfeiting to the United States a  
22 Samsung Galaxy S3 cellular phone. The consent judgment  
23 and -- order and judgment of forfeiture appears to have  
24 been signed by Mr. Thorneloe, by Mr. Johnson, and  
25 Mr. Atkins.

1           Was the Samsung Galaxy S3 cellular phone your  
2 phone, Mr. Johnson?

3           THE DEFENDANT: Yes, Your Honor.

4           THE COURT: Do you understand that by -- when I  
5 sign this that you would be forfeiting that item of  
6 property to the United States?

7           THE DEFENDANT: Yes, Your Honor.

8           THE COURT: All right. Let me sign that order.  
9 It's been signed, and I'll give that to Ms. Wurst for  
10 filing. Now is there anything further?

11          MR. THORNELOE: No, Your Honor.

12          THE COURT: One other thing there is. We need to  
13 have Mr. Atkins review and sign a document for the  
14 probation office in which he can select whether or not he  
15 wishes to have Mr. Johnson interviewed by the probation  
16 office as a part of the presentence process. Our  
17 electronics are not working today so you're going to have  
18 to do it the old-fashioned way by paper. I'm advised  
19 that the document has been signed and it has now been  
20 filed.

21          Anything further, Mr. Thorneloe, for the  
22 government?

23          MR. THORNELOE: No, Your Honor.

24          THE COURT: How about for the defendant,  
25 Mr. Atkins?

1 MR. ATKINS: No, Your Honor.

2 THE COURT: All right. That will complete all  
3 proceedings for today in regard to Mr. Johnson. Good  
4 luck to you, Mr. Johnson.

5 THE DEFENDANT: Thank you, Your Honor.

6 (Off the record at 10:02 a.m.)

7 **CERTIFICATE**

8 I, Tracy Rae Dunlap, RMR, CRR, an Official Court  
9 Reporter for the United States District Court for the  
10 Western District of North Carolina, Charlotte Division,  
11 do hereby certify that I transcribed, by machine  
shorthand, the proceedings had in the case of UNITED  
STATES OF AMERICA versus BENJAMIN ERNEST JOHNSON,  
Criminal Action 1:16-CR-6, on May 11, 2016.

12 In witness whereof, I have hereto subscribed my  
13 name, this 31st day of January, 2017.

14 \_\_/S/\_\_Tracy Rae Dunlap\_\_  
15 TRACY RAE DUNLAP, RMR, CRR  
16 OFFICIAL COURT REPORTER  
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